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In the Supreme Court of the United States

OCTOBER TERM, 1992

THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA, PETITIONER

v.

MICHAEL J. ROTKO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a local rule of a federal district court requiring federal prosecutors to obtain prior judicial approval under standards of need and relevance before a grand jury subpoena may be served on an attorney exceeds the district court's rulemaking authority.

2. Whether a State may impose such a requirement on a federal prosecutor in connection with federal grand jury proceedings.

PARTIES TO THE PROCEEDING

The original plaintiffs in the district court were Michael M. Baylson, James J. West, and Charles D. Sheehy, the United States Attorneys for the Eastern, Middle, and Western Districts of Pennsylvania, respectively. By stipulation approved by the district court on March 6, 1990, Thomas J. Corbett, Jr., who succeeded Mr. Sheehy as the United States Attorney for the Western District of Pennsylvania, was substituted as a plaintiff in his place. On January 15, 1993, pursuant to 28 U.S.C. 546, the Attorney General appointed Michael J. Rotko as the United States Attorney for the Eastern District of Pennsylvania, succeeding Mr. Baylson. Consistent with the March 1990 stipulation, we have substituted Mr. Rotko for Mr. Baylson as a respondent in this Court.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	18

TABLE OF AUTHORITIES

Cases:

California v. *ARC America Corp.*, 490 U.S. 93 (1989)	15
Certain Complaints Under Investigation, In re, 783 F.2d 1488 (11th Cir.), cert. denied, 477 U.S. 904 (1986)	10-11
Colgrove v. *Battin*, 413 U.S. 149 (1973)	12
Curtiss-Wright Corp. v. *General Electric Co.*, 446 U.S. 1 (1980)	12
Doe v. *DiGenova*, 779 F.2d 74 (D.C. Cir. 1985)	10
Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975)	14-15
Hancock v. *Train*, 426 U.S. 167 (1976)	16
Leis v. *Flynt*, 439 U.S. 438 (1979)	14
Miner v. *Atlass*, 363 U.S. 641 (1960)	12
Neil v. *Biggers*, 409 U.S. 188 (1972)	16
Nix v. *Whiteside*, 475 U.S. 157 (1986)	14
Public Utilities Comm'n v. *United States*, 355 U.S. 534 (1958)	16
Snyder, In re, 472 U.S. 634 (1985)	14
Sperry v. *Florida*, 373 U.S. 379 (1963)	7
Trans World Airlines, Inc. v. *Hardison*, 432 U.S 63 (1977)	16
United States of America, In re, No. 92-2021 (1st Cir. Sept. 21, 1992)	17
United States v. *Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d)	10

Cases—Continued: Page

United States v. *Calandra*, 414 U.S. 338 (1974) 9
United States v. *Dionisio*, 410 U.S. 1 (1973) 9
United States v. *Klubock*, 832 F.2d 664 (1st Cir. 1987) 7, 16, 17
United States v. *Miller*, 425 U.S. 435 (1976) 10
United States v. *Nixon*, 418 U.S. 683 (1974) 5, 6
United States v. *R. Enterprises, Inc.*, 111 S. Ct. 722 (1991) 5, 6, 7, 9, 17, 18
United States v. *Williams*, 112 S. Ct. 1735 (1992) 6, 7, 9 10, 17, 18

Constitution, statute and rules:

U.S. Const. Art. VI, Cl.2 (Supremacy Clause) 3, 4, 13
28 U.S.C. 2071 4
28 U.S.C. 2071(a) 4
Fed. R. Civ. P.:
Rule 83 12
Fed. R. Crim. P.:
Rule 6(e) 11
Rule 17 ..... 4, 5, 6, 7, 8, 10, 11, 13, 14
Rule 57 ..... 4, 5, 7, 11, 12
Advisory Committee Note 5, 11, 12
Model Rules of Professional Conduct 13
Pennsylvania Rules of Professional Conduct:
Rule 1.6 2
Rule 3.10 ..... *passim*

Miscellaneous:

Note, *Rule 83 and the Local Federal Rules*, 67 Colum. L. Rev. 1251 (1967) 12
12 C. Wright & A. Miller, *Federal Practice and Procedure* (1973) 12

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 975 F.2d 102. The opinion of the district court (Pet. App. 23a-62a) is reported at 764 F. Supp. 328.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21a-22a) was entered on September 16, 1992. The petition for a writ of certiorari was filed on December 14, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 7, 1988, the Supreme Court of Pennsylvania adopted Rule 3.10 of its Rules of Professional Conduct, which govern the conduct of lawyers who practice in Pennsylvania. Rule 3.10 provides:

> A public prosecutor or other governmental lawyer shall not, without prior judicial approval, subpoena an attorney to appear before a grand jury or other tribunal investigating criminal activity in circumstances where the prosecutor or other governmental lawyer seeks to compel the attorney/witness to provide evidence concerning a person who is or has been represented by the attorney/witness.

Pet. App. 2a. The Comment to the Rule explains:

> It is intended that the required "prior judicial approval" will normally be withheld unless, after a hearing conducted with due regard for the need for appropriate secrecy, the court finds (1) the information sought is not protected from disclosure by Rule 1.6 [1], the attorney-client privilege or the work product doctrine; (2) the evidence sought is relevant to the proceeding; (3) compli-

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[1] Rule 1.6 provides that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation." Pet. App. 53a. The commentary to Rule 1.6 makes clear that it is broader than the evidentiary privilege for attorney-client communications: "The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Pet. App. 54a.

> ance with the subpoena would not be unreasonable or oppressive; (4) the purpose of the subpoena is not primarily to harass the attorney/witness or his or her client; and (5) there is no other feasible alternative to obtain the information sought.

Pet. App. 3a. Prior to the adoption of Rule 3.10 by the Pennsylvania Supreme Court, the United States District Courts for the Eastern, Middle, and Western Districts of Pennsylvania had adopted the Rules of Professional Conduct of the Pennsylvania Supreme Court, as amended from time to time, as the standards of professional conduct for attorneys admitted to practice before those courts. See Pet. 3-4. After Rule 3.10 was adopted, each of the federal district courts entered orders purporting to exclude Rule 3.10 from its local rules. Pet. App. 3a, 25a-27a.

2. On July 19, 1989, respondents—the United States Attorneys for the Eastern, Middle, and Western Districts of Pennsylvania—filed this action in the United States District Court for the Eastern District of Pennsylvania against petitioner, the entity charged with administering and enforcing the disciplinary rules adopted by the Pennsylvania Supreme Court. Respondents contended that application of Rule 3.10 to federal prosecutors violates the Supremacy Clause, and they sought injunctive and declaratory relief preventing petitioner from enforcing Rule 3.10 against attorneys admitted to practice in Pennsylvania who appear in federal court on behalf of the United States.

The district court entered judgment in favor of the respondents. Pet. App. 23a-63a. As a threshold matter, the court held that each district court's

action to exclude Rule 3.10 from automatic incorporation as part of its local rules was invalid because the courts had failed to utilize an advisory committee and to give adequate public notice and opportunity to comment prior to the revision, as required by 28 U.S.C. 2071. Pet. App. 29a-36a. On the merits, however, the district court held that Rule 3.10's requirement of judicial approval prior to service of a subpoena is contrary to federal grand jury law and practice (Pet. App. 39a-50a) and to Fed. R. Crim. P. 17 (Pet. App. 56a-60a), and that state disciplinary action brought under Rule 3.10 against federal prosecutors would violate the Supremacy Clause (Pet. App. 61a-62a). Accordingly, the court declared Rule 3.10 to be in conflict with federal law and barred petitioner from enforcing that Rule against any prosecutor or other government attorney when practicing before any of the three federal district courts in Pennsylvania. *Id.* at 63a.

3. The court of appeals affirmed. It held that the automatic incorporation of Rule 3.10 exceeded the district courts' local rulemaking authority and that petitioner's enforcement of the Rule against federal prosecutors would violate the Supremacy Clause. Pet. App. 1a-20a.

The court of appeals first noted that under 28 U.S.C. 2071(a) and Fed. R. Crim. P. 57, local rules adopted by a federal district court must be consistent with the Federal Rules of Criminal Procedure. The court of appeals explained that in its view, Rule 3.10 fails that test because it is inconsistent with Fed. R. Crim. P. 17. Specifically, the court pointed out that paragraph (a) of Rule 17 provides that "[a] subpoena

shall be issued by the clerk under the seal of the court," and it noted that "neither Rule 17 nor any other provision in the federal rules or statutes allows for judicial intervention before a subpoena is served." Pet. App. 9a, 10a. Rather, paragraph (c) provides that a party may move to quash a subpoena only after the subpoena is served, and only on the ground that compliance would be unreasonable or oppressive. Thus, the court held that "Rule 3.10 is inconsistent with Fed. R. Crim. P. 17 because it impermissibly extends the ministerial role granted the district courts in subpoena practice." Pet. App. 10a.

In a similar vein, the court of appeals held that Rule 3.10 goes beyond the "matters of detail" that Fed. R. Crim. P. 57 contemplates for local rules, which are intended to supplement the "comprehensive procedural code for criminal cases in Federal courts" prescribed by the Federal Rules of Criminal Procedure. Pet. App. 11a (quoting Advisory Committee Note to Rule 57 (emphasis omitted)). "Instead," the court reasoned, "Rule 3.10 seeks to establish a broad mechanism for pre-service judicial review of attorney subpoenas, with attendant rules of procedure and rules of evidence." Pet. App. 12a.

Finally, the court of appeals rejected the contention that the district courts were authorized to adopt Rule 3.10 in the exercise of their "supervisory powers" over the grand jury. Pet. App. 12a-16a. It noted that in *United States* v. *R. Enterprises, Inc.*, 111 S. Ct. 722 (1991), this Court held that the showing of relevance and admissibility necessary for enforcement of a trial subpoena under Fed. R. Crim. P. 17 and *United States* v. *Nixon*, 418 U.S. 683, 699-700 (1974), is inapplicable

to grand jury subpoenas, because the grand jury has traditionally been free of the rules and restraints imposed at trial and because imposition of the *Nixon* requirements would invite procedural delays while courts evaluated the relevance and admissibility of the subpoenaed material. Yet, the court of appeals observed, "Rule 3.10 requires a court to use the same standards in approving the service of a grand jury subpoena on an attorney as the Supreme Court held to be inappropriate to grand jury proceedings in *R. Enterprises*." Pet. App. 13a. The court of appeals further noted that in *United States* v. *Williams*, 112 S. Ct. 1735 (1992), this Court rejected a broad role for a district court's supervisory power in connection with grand jury proceedings, explaining that "[i]t certainly would not permit judicial reshaping of the grand jury institution, substantially altering the traditional relationships between the prosecutor, the constitutional court and the grand jury itself." Pet. App. 14a-15a (quoting 112 S. Ct. at 1744).

Having concluded that the district courts lack authority to impose the requirements in Rule 3.10 as a matter of federal law, the court of appeals rejected petitioner's claim that Rule 3.10 nevertheless is enforceable against federal prosecutors as a state rule of professional conduct. Pet. App. 16a-19a. Alhough the court acknowledged Pennsylvania's interest in regulating attorneys licensed to practice in the Commonwealth, it concluded that Pennsylvania could not regulate the practice of federal prosecutors in a manner inconsistent with Fed. R. Crim. P. 17. Pet. App. 19a. The court also found Rule 3.10 invalid because it " 'imposes upon the performance' of federal

grand jury activity 'conditions not contemplated by Congress.' " *Id.* at 19a (quoting *Sperry* v. *Florida*, 373 U.S. 379, 385 (1963)).

ARGUMENT

The decision of the court of appeals is correct and is consistent with—indeed virtually compelled by—this Court's decisions in *United States* v. *R. Enterprises*, 111 S. Ct. 722 (1991), and *United States* v. *Williams*, 112 S. Ct. 1735 (1992). The ruling below also is consistent with a long line of decisions by other courts of appeals rejecting special rules for grand jury subpoenas issued to attorneys. See Pet. App. 49a-50a. The only contrary appellate ruling is *United States* v. *Klubock*, 832 F.2d 664 (1st Cir. 1987), which affirmed by an equally divided court a district court decision sustaining a local rule similar to Rule 3.10. That affirmance has no precedential force even in the First Circuit, and it preceded this Court's decisions in *R. Enterprises* and *Williams*. Because there is no live circuit conflict on the issue presented in this case, review by this Court is not warranted.

1. The court of appeals correctly held that the automatic incorporation of Rule 3.10 into the local rules of the three federal district courts in Pennsylvania exceeded the rulemaking authority of those courts. Rule 57 of the Federal Rules of Criminal Procedure authorizes a district court to adopt local rules "not inconsistent with these rules." The requirement in Rule 3.10 that the United States Attorney or other federal attorney obtain judicial approval prior to serving a grand jury subpoena on an attorney is inconsistent with federal grand jury practice contemplated by Fed. R. Crim. P. 17.

a. Paragraph (a) of Rule 17 provides that "[a] subpoena shall be issued by the clerk under the seal of the court" and that "[t]he clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks when it is served." That paragraph contemplates only a ministerial role for the court in the issuance and service of a subpoena. As paragraph (c) makes clear, Rule 17 provides for a court to consider possible substantive objections to a subpoena only in response to a motion to quash filed by the recipient *after* the subpoena is served.[2] Because Rule 17 comprehensively addresses the subject and embodies a clear policy choice that district courts should not have "the power to screen grand jury subpoenas prior to service," Pet. App. 11a, the court of appeals correctly concluded that Rule 3.10 "impermissibly extends the ministerial role granted the district courts in subpoena practice." Pet. App. 10a. As the district court explained, the supposed "silence" of Rule 17 on the precise question of prior judicial approval "cannot be construed as an invitation to assign judges new functions in the grand jury subpoena process" by local initiative. Pet. App. 58a.

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[2] The only occasion for a preservice judicial role under Rule 17 is pursuant to paragraph (b), which provides that a court shall order that a subpoena be issued for service on a named witness upon an ex parte application by a defendant who shows that he is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. As the district court pointed out, the fact that Rule 17 authorizes preservice judicial screening in that situation (in order to conserve financial resources) "further suggests that it is not permissible as a general proposition." Pet. App. 58a.

The correctness of that conclusion is strongly reinforced by this Court's decisions in *R. Enterprises* and *Williams*. In *R. Enterprises*, the Court reiterated that the grand jury has broad power to "compel the production of evidence or the testimony of witnesses as it considers appropriate," 111 S. Ct. at 726 (quoting *United States* v. *Calandra*, 414 U.S. 338, 343 (1974)); that a grand jury subpoena enjoys a presumption of regularity that must be overcome by the party challenging it, 111 S. Ct. at 728; that a court therefore may not place an initial burden on the government to justify the subpoena, *ibid.*; and that courts may not require "mini-trials and preliminary showings" on issues of need or relevance, because such proceedings would impermissibly "delay[] and detour[]" the grand jury investigation and because "[o]ne simply cannot know in advance whether information sought * * * will be relevant and admissible," *id.* at 727. See also *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973). Rule 3.10, which erects a presumption against the validity of a subpoena issued to an attorney and places the initial burden on the government to justify such a subpoena, cannot be reconciled with *R. Enterprises*.

In *Williams*, the Court reaffirmed the independence from the district court's supervisory authority of both the grand jury and the prosecutor who aids the grand jury in its investigation. Thus, in holding that courts may not require a prosecutor to present exculpatory evidence to the grand jury, the Court made clear that the supervisory power does "not permit judicial reshaping of the grand jury institution, substantially altering the traditional relation-

ships between the prosecutor, the constituting court, and the grand jury itself." 112 S. Ct. at 1744. Yet that is precisely what petitioner argues the federal district courts should have been permitted to do here. Moreover, the Court in *Williams* rejected the notion that the district court may accomplish through regulation of the prosecutor's conduct what it could not accomplish by imposing requirements directly on the grand jury. 112 S. Ct. at 1745.[3]

Petitioner contends (Pet. 12-19) that the court below announced a test that would invalidate a local rule whenever one of the Federal Rules of Criminal Procedure does not affirmatively authorize the practice provided for by the local rule. Contrary to the premise of petitioner's contention, Rule 17 does not merely fail to authorize the practice of pre-service judicial approval; it comprehensively addresses the subject of judicial involvement in the issuance and service of subpoenas and confirms a practice, followed since well before the federal rules were promulgated, under which the district court does not become involved in the subpoena process before the subpoena is issued and served. See, *e.g.*, *United States* v. *Miller*, 425 U.S. 435, 446 n.8 (1976); *United States* v. *Burr*, 25 F. Cas. 30, 35 (C.C.D. Va. 1807) (No. 14,692d); *Doe* v. *DiGenova*, 779 F.2d 74, 80 (D.C. Cir. 1985); *In re Certain Complaints Under*

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[3] As the district court further found, Rule 3.10 is also inconsistent with Fed. R. Crim. P. 6(e), which protects the secrecy of grand jury proceedings, because Rule 3.10 requires the prosecutor to disclose the nature of the grand jury's inquiry in an adversary hearing in order to justify service of the subpoena. Pet. App. 39a-42a.

Investigation, 783 F.2d 1488, 1495 (11th Cir.), cert. denied, 477 U.S. 904 (1986). As a result, Rule 3.10 does not supplement Fed. R. Crim. P. 17; it affirmatively clashes with it.

b. Petitioner takes issue (Pet. 12-14) with the court of appeals' observation that local rules are intended to address "matters of detail." See Pet. App. 11a-12a (quoting Advisory Committee Note to Rule 57. The court of appeals quoted that phrase, however, as part of a more general explanation of how far the fundamental changes worked by Rule 3.10 depart from the kinds of subjects local rules typically address. The court did not give the phrase "matters of detail" an inflexible, talismanic significance.

Moreover, whatever may be the appropriate articulation of the limitation on local rulemaking authority (and petitioner presumably would agree that there is *some* limitation), Rule 3.10 clearly transgresses it. As the district court explained, "Rule 3.10 initially creates a rule of criminal procedure that contains evidentiary standards for judicial review and then impresses an ethical duty upon prosecutors to adhere to that procedure." Pet. App. 38a. It thus substantively alters grand jury practice by adding a requirement, under the guise of regulating attorney ethics, that would delay the grand jury's investigation, expose its work to examination in adversary proceedings, require the prosecutor to justify the issuance of the subpoena by a showing of relevance and need, and "dramatically expand[] the scope of privilege protections for attorneys and their clients." Pet. App. 50a. For these reasons, the holding below that Rule 3.10 is beyond the local rulemaking power of the federal

district courts is fully consistent with this Court's admonition that local rules may not work "basic procedural innovations." *Miner* v. *Atlass*, 363 U.S. 641, 650 (1960).[4] See also Note, *Rule 83 and the Local Federal Rules*, 67 Colum. L. Rev. 1251, 1255-1256 (1967) (district courts may promulgate rules involving "unusual or minor procedural problems that arise" in connection with peculiarly local needs). Only a single, uniform rulemaking process affords the sort of opportunity for careful review and public discussion that is necessary when issues of nationwide interest and importance are involved. 12 C. Wright & A. Miller, *Federal Practice and Procedure* §§ 3152, 3154, at 218, 220, 228 (1973).[5]

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[4] Petitioner errs in contending (Pet. 14) that the court of appeals' reliance on the Advisory Committee Note conflicts with *Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1, 9-10 (1980). Nothing in *Curtiss-Wright* suggests that it is improper to look to the Advisory Committee Notes when determining the meaning of a federal rule. Rather, the Court there disagreed with the court of appeals' interpretation of an explanatory phrase in a Note that "in isolation is neither workable nor entirely reliable as a benchmark." *Id.* at 10.

[5] Petitioner contends (Pet. 13) that this Court "has frequently approved a more generous construction of Rule 57." Its sole authority for that proposition, however, is *Colgrove* v. *Battin*, 413 U.S. 149 (1973), in which the Court approved a local rule, promulgated under Fed. R. Civ. P. 83, that allowed the use of six-member juries in civil cases. The Court in *Colgrove* specifically noted that the six-member jury rule was not a "basic procedural innovation" that is beyond a district court's rulemaking power under *Miner* v. *Atlass*. 413 U.S. at 164 n.23. Moreover, unlike the Note to Fed. R. Civ. P. 83, the Advisory Committee Note to Fed. R. Crim. P. 57 specifically cautions that local rules may address only "matters of detail."

c. Petitioner errs in asserting (Pet. 14-16) that a wide variety of local rules governing pretrial practice would be struck down under the decision below. The Third Circuit's invalidation of a novel "ethics" rule imposing substantive requirements of relevance and need before the government may even serve a grand jury subpoena on an attorney in no way suggests that the truly procedural rules cited by petitioner are also invalid.[6] Petitioner's contrary assertion rests in large part on the premise that the court of appeals invalidated Rule 3.10 merely because it was not affirmatively authorized by Fed. R. Crim. P. 17. As we have explained above, that premise is mistaken.

Petitioner also asserts (Pet. 16-17) that "few of the ethical rules adopted by federal district courts can survive the Court of Appeals' analysis." For example, petitioner suggests (Pet. 18) that ethical rules barring attorneys from knowingly presenting perjured testimony or requiring prosecutors to make timely disclosure of exculpatory evidence are at risk under the decision below. Petitioner also identifies (Pet. 19 n.22) a number of other provisions of the Model Rules of Professional Conduct that it asserts are now "threatened." None of the rules that petitioner cites, however, is directly or indirectly contrary to federal law. Consequently, the analysis by the court below has no bearing on their continued viability.

2. Petitioner complains (Pet. 19-23) that the court of appeals was "insensitive" in its Supremacy Clause

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[6] The court of appeals in fact reconciled its decision with cases in which local rules have been upheld. See Pet. App. 11a-12a.

analysis to the States' interests in regulating the conduct of attorneys. We disagree. If, as we have shown, Rule 3.10 is beyond the authority of the federal district courts to impose on the conduct of federal grand jury proceedings, it follows a fortiori that the requirements of that Rule are beyond the authority of the Commonwealth of Pennsylvania to impose on federal grand jury proceedings.

Pennsylvania cannot avoid that result by characterizing Rule 3.10 as an "ethical" rule that regulates the conduct of prosecutors. The court of appeals properly recognized that Rule 3.10 is "only nominally addressed" to the conduct of attorneys, Pet. App. 38a, and that in fact it is a rule of criminal procedure that regulates the prerogatives of the United States government and federal grand juries.[7] The court of appeals reasonably found that in applying Rule 3.10 to federal prosecutors who act on behalf of the United States in invoking its rights as a "party" under Rule 17, Pennsylvania impermissibly intruded upon legitimate federal interests. In doing so, the court of appeals did not question the States' authority and duty to regulate the ethical conduct of the attorneys admitted to practice in their courts. See, *e.g.*, *Nix* v. *Whiteside*, 475 U.S. 157, 165 (1986); *In re Snyder*, 472 U.S. 634, 645 (1985); *Leis* v. *Flynt*, 439 U.S. 438, 442 (1979); *Goldfarb* v. *Virginia State Bar*,

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[7] The district court found that Rule 3.10 "is a rule of criminal procedure that imposes a concomitant restraint on the actions of courts and federal grand juries" and "contains evidentiary standards for judicial review," which it then visits upon prosecutors through the commands of an "ethical duty." Pet. App. 38a.

421 U.S. 773, 792-793 (1975). That principle is inapposite here, however, in light of the recognition by both courts below (Pet. App. 19a, 38a) that Rule 3.10 is intended to and does operate as a rule of criminal procedure, not as a rule governing attorney ethics.

Petitioner also contends (Pet. 20) that the court of appeals applied an erroneous test of incompatibility with federal law. According to petitioner, there should be no presumption in favor of preemption of a state rule regulating attorney ethics. As we have noted, however, Rule 3.10 is not an "ethical" proscription at all; it is part of an overall effort to rewrite federal grand jury law and revise federal grand jury practice because of a substantive disagreement with a line of federal appellate decisions that have refused to impose the very limits that Rule 3.10 contains on the issuance of federal grand jury subpoenas to attorneys. See Pet. App. 49a-50a (collecting cases). Accordingly, Rule 3.10 does not affect "a field traditionally occupied by the States," *California* v. *ARC America Corp.*, 490 U.S. 93, 101 (1989), in which a presumption against preemption might be appropriate.

The manner in which a federal prosecutor represents the United States' sovereign interest in a federal grand jury investigation is presumptively a matter of exclusive federal concern. In such a setting, the governing statutes or rules need not manifest a specific intention to exclude state involvement, and preemption does not depend upon a demonstration of specific interference with federal policy or inconsistency with existing federal regula-

tion. That is because "the activities of the Federal Government are free from regulation by any state" where "Congress does not affirmatively declare" otherwise. *Hancock* v. *Train*, 426 U.S. 167, 178, 179 (1976). Because Rule 3.10 "places a prohibition on the Federal Government" itself, it fails to respect that principle of federal supremacy. *Public Utilities Comm'n* v. *United States*, 355 U.S. 534, 544 (1958); *Hancock* v. *Train*, 426 U.S. at 180.

3. Finally, petitioner contends (Pet. 23-29) that review is warranted because the decision below conflicts with the decision of the First Circuit in *United States* v. *Klubock*, 832 F.2d 664 (1987) (en banc). That alleged conflict does not warrant resolution by this Court.

In *Klubock*, an equally divided court of appeals affirmed a district court judgment that sustained a similar rule incorporated by the federal district court in Massachusetts.[8] "Judgment entered by an equally divided Court is not 'entitled to precedential weight.'" *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 73 n.8 (1977) (quoting *Neil* v. *Biggers*, 409 U.S. 188, 192 (1972)). Because *Klubock* has no precedential force, it does not give rise to a live circuit conflict for this Court to resolve.

Moreover, in *Klubock* the three judges who voted to affirm the district court's judgment sustaining the local rule assumed that district courts have broad supervisory authority to regulate the grand jury and

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[8] Unlike Rule 3.10, the Massachusetts rule did not require or suggest an adversary hearing or provide standards of relevance and need by which judges were to be guided in passing on subpoena requests.

prosecutorial conduct before the grand jury. 832 F.2d at 667. That rationale has since been rejected by this Court in *R. Enterprises* and *Williams*. In addition, the remaining force of the district court's judgment in *Klubock*, even in Massachusetts, may be shortlived. The United States recently filed a petition for a writ of mandamus seeking review by the First Circuit of a Rhode Island "ethical" rule that is almost identical to Rule 3.10. The First Circuit dismissed the mandamus petition on the ground that the United States should first file an action in the district court, as it did in *Klubock* and the instant case. *In re: United States of America*, No. 92-2021 (1st Cir. Sept. 21, 1992). Such a suit has since been filed and is now pending. *Almond* v. *United States District Court*, No. CA 92-0663 (D.R.I. filed Dec. 4, 1992).[9] Further proceedings in *Almond* will afford the First Circuit an opportunity to revisit the issue presented in *Klubock* in light of *R. Enterprises* and *Williams*, and in light of the Third Circuit's thorough analysis in this case. There is every reason to believe that the First Circuit would now invalidate such a rule; if so, the Massachusetts rule on which petitioner relies will no longer apply to federal prosecutors. On the other hand, if the First Circuit should sustain the Rhode Island rule in the face of those intervening precedents, there will be time enough for this Court to grant review. For now, however, the issue is not ripe for review.[10]

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[9] *Almond* was transferred to the District of New Hampshire on January 8, 1993.

[10] Petitioner also notes (Pet. 26) that similar ethical requirements have been adopted by Virginia and Tennessee.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1993

The United States District Court for the Eastern District of Virginia, however, specifically declined to incorporate Virginia's requirement of prior judicial approval of attorney subpoenas. The other federal district courts in Virignia and Tennessee apparently have not yet been presented with an opportunity to consider the validity of that requirement in light of *R. Enterprises*, *Williams*, and the Third Circuit's decision in the instant case.